

performance of the receiver *pendente lite*'s duties.

BY THE COURT:

, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CORY A. RESH,

Plaintiff,

v.

JODY BORTNER; and
3FX, INC.

Defendants.

CIVIL ACTION

No. 16-cv-2437(CMR)

JURY TRIAL DEMANDED

PLAINTIFF'S PETITION FOR APPOINTMENT OF A RECEIVER *PENDENTE LITE*

Plaintiff, Cory A. Resh ("Resh"), by and through undersigned counsel, hereby petitions this Honorable Court for the appointment of a receiver *pendente lite*, and in support thereof avers as follows:

1. As set forth in detail in the Affidavit of Resh attached hereto as Exhibit A, defendant Jody Bortner ("Bortner") has breached her fiduciary obligation to Resh by freezing him out of the corporation that they co-own and founded, defendant 3FX, Inc. ("3FX"). Resh has filed a Complaint seeking, *inter alia*, dissolution of the corporation, and the appointment of a liquidating receiver. A true and correct copy of said Complaint is attached hereto as Exhibit B. To preserve the status quo until such time as the case can be decided on its merits, Resh requests this Honorable Court to appoint a receiver *pendente lite* to secure the financial condition of 3FX pending the outcome of the parties' dispute on the merits.

2. In 1995, Resh, Bortner and Greg O'Driscoll ("O'Driscoll") decided to go into a 3D animation business together as equal partners. They incorporated 3FX, with each of the three principals owning one-third of the shares of stock and constituting the officers and directors of

the corporation.

3. When the business was started, Resh already had 14 years of experience as a 3D animation artist and had won an Emmy award. Bortner was a 2D artist without significant experience in 3D animation. O'Driscoll had experience in sales and marketing.

4. Approximately one year after the business commenced, Resh and Bortner purchased O'Driscoll's shares in the business, whereupon and continuing to this day, Resh and Bortner have been equal 50% shareholders of 3FX, as well as the only officers and directors of the corporation.

5. As equal owners of 3FX, until the events giving rise to this lawsuit, Resh and Bortner have been required to work together and in consultation on all matters of importance to the corporation, and to reach a consensus about how to proceed in the best interests of the corporation.

6. After hiring and training production staff with 3D animation experience, in or about 2001, Resh's job duties were transitioned to Sales and Marketing. Bortner was a Project Manager and she took care of the day to day operations of the business.

7. The business of 3FX continued to grow, and in 2005, it hired the first of several Sales Representatives. At that point, Resh's role in the business was managing and working with the Sales Representatives to find new business and increase the revenue of 3FX. He was responsible for contacting and meeting with potential clients, presenting 3FX's capabilities, creating written project proposals, and furthering 3FX's offerings to clients through collaborations with outside vendors. Resh also produced print and electronic marketing materials, the company website, demo reels, etc.

8. Bortner's role continued to be as a Project Manager and to oversee daily operations of the company.

9. As equal owners of 3FX, Resh and Bortner received equal compensation from the corporation.

10. In the beginning of 2013, Bortner approached Resh and told him that, despite the fact that he had been in charge of all sales, marketing, and business development for the previous 12 years, she believed she could do a better job of increasing business revenue for 3FX.

11. After that conversation, Bortner began to do things "her way" and often without consulting Resh about important matters affecting the business of 3FX.

12. For example, in May 2013, Bortner hired Neil Gottlieb ("Gottlieb") as Vice President of Sales, Marketing & Business Strategy. Bortner conducted the hiring process to the exclusion of Resh and never allowed him to meet or interview the candidates. Following her hiring decision, Bortner also determined, without Resh's input or approval, to pay Gottlieb \$135,000 per year, plus a 10% commission on all projects awarded to him. 3FX's previous sales representatives had been paid base salaries of \$50,000 per year. As a result of Bortner's unilateral decision, Gottlieb now earns more compensation from 3FX than even the owners.

13. Subsequent to her unilateral hiring of Gottlieb, Bortner started to work very closely with him, and together they made a concerted effort to ignore Resh and to exclude him from important business matters.

14. For example, Bortner and Gottlieb conducted meetings regarding the direction of the company's sales and marketing efforts. Resh was not invited to attend these meetings, nor was he made aware that they were occurring at the time. The existing strategies that had been

implemented by Resh along with another Sales Representative were dismissed and ignored by Bortner.

15. Frustrated by the lack of respect shown to him by Bortner, in July 2013, the other Sales Representative abruptly resigned his position with 3FX, which resulted in a substantial loss of revenue for the business.

16. Resh spent the remainder of the 2013 insisting the Bortner include him in all discussions regarding sales and marketing. Bortner denied Resh at every turn. She was adamant that her decisions were the best for the company, and that Resh's decisions, thoughts and ideas were of no use. She began to run 3FX as if she were the majority controlling shareholder of the corporation and Resh were a minority owner whose vote was less valuable than hers.

17. While it was evident that it would be difficult, if not impossible, to repair their working relationship as co-owners of 3FX, Bortner and Resh were able to reach a consensus that it would be best for her to purchase Resh's shares of the corporation. To this end, in 2013, they began to negotiate regarding the price and terms of a buyout of his interest in the corporation. However, although negotiations continued for an extended period, they were unable to reach an agreement.

18. In 2014, Bortner's conduct toward Resh became even more brazen, open and adversarial. She ignored his input as an owner, officer and director of the corporation for the entirety of 2014. At the employee Christmas party that year, Bortner made a speech to the employees which completely excluded Resh in all manner. This made it clear to the entire staff of 3FX that Bortner was acting as the controlling owner, and that she had no regard for Resh.

19. In January 2015, upon Resh's continued objection to her excluding him from the

corporation's affairs and important business decisions, Bortner and Resh agreed to work toward finalizing a buy-out of his shares by the end of 2015.

20. In August 2015, Resh accepted Bortner's offer of \$1,000,000 for the purchase of his shares over a 4-year term. However, they were unable to finalize the terms of the buyout because, *inter alia*, Bortner was unwilling to guaranty the payments. She wanted to own 100% of the corporation's shares, but she was not willing to pay for them, except from the profits of the corporation, if profits were available. Thereafter, Bortner withdrew her offer to purchase Resh's shares entirely.

21. Nevertheless, and despite the fact the buyout negotiations were terminated by Bortner, she has continued to run the corporation as its controlling shareholder, excluding Resh from all decisions and ignoring his objections to her unilateral decisions.

22. In June 2015, Bortner unilaterally reduced Resh's annual salary from \$100,000 to \$25,000.

23. Subsequently, Bortner has excluded Resh from all decisions regarding hiring, employee salaries, capital expenses, etc.

24. Moreover, Bortner has prevented Resh having access to the corporation's financial records. Despite his requests, he has not received financial reports since October 2015. He was not consulted with regard to the year-end bonus/distribution decisions that he and Bortner had typically made together at year's end since 1995. Bortner is simply determined to run the company her way, with absolutely no regard for Resh's rights as a 50% owner, officer and director.

25. In the 2-1/2 years that Bortner has run the company her way and to the exclusion

of Resh, 3FX has seen no significant increase in revenues. However, there have been substantial increases in unwarranted overhead expenses.

26. 3FX is no longer being run efficiently or cost effectively.

27. Prior to Resh having been frozen out of the corporation by Bortner, the fair market value of 3FX was in excess of \$2,000,000.

28. As a result of Bortner's unilateral and poor decisions, self-dealing and mismanagement, the current value of 3FX has likely dropped substantially.

29. Bortner has breached her fiduciary duty to Resh by freezing him out of the corporation and oppressing his rights as a shareholder of 3FX.

30. The breaches of fiduciary duty by Bortner and freeze out of has included, *inter alia*, the following:

a. Bortner has increased her annual salary from \$100,000 to \$150,000 while decreasing Resh's salary from \$100,000 to \$25,000.

b. In 2013, Bortner unilaterally provided three (3) top employees 40% increases in salary.

c. Bortner scheduled a meeting with a client, Hoffmann La-Roche, in Basel, Switzerland to introduce Gottlieb as the client's new 3FX contact. Bortner brought her husband and young daughter with her on that trip. All four of them flew first class and stayed at an expensive hotel on funds advanced by 3FX. Bortner told Resh that these expenses would be reimbursed to 3FX by the client. However, when the expense report was submitted to the client, it refused reimbursement because the costs were unwarranted and excessive.

d. Bortner unilaterally agreed to pay Gottlieb a 10% commission of Hoffmann-La Roche projects even though that account pre-dated his hiring.

e. In 2014, Bortner and Gottlieb hired Debbie Cauterucci as a Sales Representative at an annual salary of \$85,000. She lasted only 6 months, during which she obtained only a single, small value project.

f. Bortner engaged a personal friend, Dawn Sedgwick, as a freelance Project Manager and paid her approximately \$20,000 to perform services that could have been done in-house at a greatly reduced cost.

g. Bortner hired Vendere Partners as an outside sales company. This decision cost 3FX \$33,000, but resulted in no business.

h. Bortner used 3FX funds, to pay invoices from her personal attorney who had attempted to negotiate Bortner's buyout of Resh's shares.

i. Bortner has used the company Citibank card to buy family groceries, lunches, technology devices, and educational purchases for her daughter.

j. In 2015, Bortner had the corporate checking account changed to require her signature only. Resh no longer has access to the corporation's checking account.

k. The use of freelancers to assist in projects has increased in 2015, even though 3FX's billings are reduced and the in-house staff is capable of producing the work without outside assistance.

l. 3FX's travel expenses have increased dramatically beginning in 2014 and much of the travel is unnecessary.

m. Resh had always been provided financial reports on a bi-weekly basis when 3FX's bookkeeper was in the office. Following the cancellation of the buyout negotiations by Bortner, she directed that Resh stop being provided those reports. Despite demand, he has not received bi-weekly financial reports since October, 2015.

n. Historically, Bortner and Resh would agree upon the appropriate year-end distribution to shareholders by Dec. 31st. However, in 2015 Bortner unilaterally determined that there would be no year-end distribution to the shareholders for the first time in 3FX's history. Effective as of January 1, 2016, she gave herself a substantial pay raise.

o. For 2016, Bortner has added \$152,000 in additional corporate salary expense.

p. Bortner has prepared an operating budget for 2016 which estimates that there will be no profits available for distribution at year's end. To date, 3FX is far behind its budgeted revenue estimates for 2016.

q. Resh has not been provided with 3FX's year-end 2015 Financial Statements.

r. On the 2015 Federal tax return, Form 1125-E Compensation of Officers, Resh's name was omitted and Bortner is listed as the only corporate officer.

s. On or around March 2015, Resh's remote access the company servers was removed.

31. Pursuant to 15 Pa.C.S. § 1767, a court may appoint a custodian for a corporation upon application of a shareholder when, "... the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5 percent or more of the outstanding shares of any class of the corporation in their capacities as

shareholders, directors, officers or employees.”

32. Because 3FX, Inc. has only two shareholders, Resh and Bortner, it qualifies as a closely held corporation. Resh owns 50% of the outstanding shares of 3FX, Inc. and he is a director of the corporation. Thus, under 15 Pa.C.S. §1767, he has standing to request this Court to appoint of a custodian to protect his rights from the oppressive conduct of Bortner.

33. The Business Corporation Law specifically empowers this Court to issue a preliminary injunction to preserve the status quo and to prevent unlawful and oppressive conduct by corporate fiduciaries. 15 Pa.C.S. §1984 provides that, “. . . the court may issue injunctions, appoint a receiver *pendente lite* with such powers and duties as the court from time to time may direct and proceed as may be requisite to preserve the corporate assets wherever situated and to carry on the business of the corporation until a full hearing can be had.”

34. The conduct of Defendants Bortner, as fully detailed in the Affidavit of Resh is oppressive.

35. To preserve the status quo, this Honorable Court must appoint a receiver *pendente lite* to safeguard the financial affairs of 3FX, Inc. until such time as the parties’ dispute can be determined on its merits.

WHEREFORE, Plaintiff Cory A. Resh respectfully requests this Honorable Court to grant his Petition for Preliminary Injunction and to enter a Preliminary Injunction in the form proposed.

Date: May 19, 2016

/s/ Stanley B. Cheiken, Esquire (SC1060)
STANLEY B. CHEIKEN, ESQUIRE

Attorney for Plaintiff Cory A. Resh

EXHIBIT A

AFFIDAVIT OF CORY A. RESH

I, Cory A. Resh, being duly sworn, do hereby depose and say as follows:

1. I am an adult individual and I am taking this Affidavit based upon my personal knowledge and in support of the Petition for Appointment of a Receiver *Pendente Lite*.
2. In 1995, Jody Bortner ("Bortner"), Greg O'Driscoll ("O'Driscoll") and I decided to go into a 3D animation business together as equal partners.
3. On September 29, 1995, 3FX, Inc. ("3FX") was incorporated in Pennsylvania, with each of the three principals owning one-third of the shares of stock and constituting the officers and directors of the corporation.
4. When we started the business, I already had 14 years of experience as a 3D animation artist, and I had won an Emmy award. Bortner was a 2D artist without significant experience in 3D animation. O'Driscoll had experience in sales and marketing.
5. Approximately one year after the business commenced, Bortner and I purchased O'Driscoll's shares in the business, whereupon and continuing to this day, Bortner and I have been equal 50% shareholders of 3FX, as well as the only officers and directors of the corporation.
6. As equal owners of 3FX, until the events giving rise to this lawsuit, Bortner and I were required to work together and in consultation on all matters of importance to the corporation, and to reach a consensus about how to proceed in the best interests of the corporation.
7. After hiring and training production staff with 3D animation experience, in or about 2001, my job duties were transitioned to Sales and Marketing. Bortner was a Project Manager and she took care of the day to day operations of the business.

8. The business of 3FX continued to grow, and in 2005, we hired our first of several Sales Representatives. At that point, my role in the business was managing and working with the Sales Representatives to find new business and increase the revenue of 3FX. To that end, I was responsible for contacting and meeting with potential clients, presenting our capabilities, creating written project proposals, and furthering 3FX's offerings to clients through collaborations with outside vendors. I also produced print and electronic marketing materials, the company website, demo reels, etc.

9. Jody Bortner's role continued to be as a Project Manager and to oversee daily operations of the company.

10. Until the events giving rise to this lawsuit, as equal owners of 3FX, at all times, Bortner and I received equal compensation from the corporation.

11. In the beginning of 2013, Bortner approached me and told me that, despite the fact that I had been in charge of all sales, marketing, and business development for the previous 12 years, she believed she could do a better job of increasing business revenue for 3FX.

12. After that conversation, Bortner began to do things "her way" and often without consulting me about important matters affecting the business of 3FX.

13. For example, in May 2013, Bortner hired Neil Gottlieb as Vice President of Sales, Marketing & Business Strategy. Bortner conducted the hiring process to my exclusion, never allowing me to meet or interview the candidates. Following her hiring decision, Bortner also determined, without my input or approval, to pay Mr. Gottlieb \$135,000 per year, plus a 10% commission on all projects awarded to him. Our previous sales representatives had been paid base salaries of \$50,000 per year. As a result of Bortner's unilateral decision, Mr. Gottlieb now earns more compensation from 3FX than even the owners.

14. Subsequent to her unilateral hiring of Mr. Gottlieb, Bortner started to work very closely with him, and together they made a concerted effort to ignore me and to exclude me from important business matters.

15. For example, Bortner and Mr. Gottlieb conducted meetings regarding the direction of the company's sales and marketing efforts. I was not invited to attend these meetings, nor was I made aware that they were occurring at the time. The existing strategies that had been implemented by another Sales Representative and me were dismissed and ignored by Bortner.

16. Frustrated by the lack of respect shown to him by Bortner, in July 2013, the other Sales Representative abruptly resigned his position with 3FX, which resulted in a substantial loss of revenue for the business.

17. I spent the remainder of the 2013, insisting that Bortner include me in all discussions regarding sales and marketing. Bortner denied me at every turn. She was adamant that her decisions were the best for the company, and that my decisions, thoughts and ideas were of no use. She began to run 3FX as if she were the majority controlling shareholder of the corporation and I was a minority owner whose vote was less valuable than hers.

18. While it was evident that it would be difficult, if not impossible, to repair our working relationship as co-owners of 3FX, Bortner and I were able to reach a consensus that it would be best for her to purchase my shares of the corporation. To this end, in 2013, we began to negotiate regarding the price and terms of a buyout of my interest in the corporation. However, although negotiations continued for an extended period, we were unable to reach an agreement.

19. In 2014, Bortner's conduct toward me became even more brazen, open and adversarial. She ignored my input as an owner, officer and director of the corporation for the

entirety of 2014. At the employee Christmas party that year, Bortner made a speech to the employees which completely excluded me in all manner. This made it clear to the entire staff of 3FX that Bortner was acting as the controlling owner, and that she had no regard for me.

20. In January 2015, upon my continued objection to her excluding me from the corporation's affairs and important business decisions, Bortner and I agreed that we would work toward finalizing a buy-out of my shares by the end of 2015.

21. In preparation for the buy-out, I moved to Florida and made it my primary residency.

22. In August 2015, I accepted Bortner's offer of \$1,000,000 for the purchase of my shares over a 4-year term. However, we were unable to finalize the terms of the buyout because, *inter alia*, Bortner was unwilling to guaranty the payments. She wanted to own 100% of the corporation's shares, but she was not willing to pay for them, except from the profits of the corporation, if profits were available. Thereafter, Bortner withdrew her offer to purchase my shares entirely.

23. Nevertheless, and despite the fact the buyout negotiations were terminated by Bortner, she has continued to run the corporation as its controlling shareholder, excluding me from all decisions and ignoring my objections to her unilateral decisions.

24. In June 2015, Bortner unilaterally reduced my annual salary from \$100,000 to \$25,000.

25. Subsequently, Bortner has excluded me from all decisions regarding hiring, employee salaries, capital expenses, etc.

26. Moreover, Bortner has prevented me having access to the corporation's financial records. I have not received financial reports since October 2015, even though I have requested

them. I was not provided year-end 2015 financial information until Jan. 7, 2016. I was not consulted with regard to the year-end bonus/distribution decisions that we had typically made together at year's end since 1995. Bortner was simply determined to run the company her way, with absolutely no regard for my rights as a 50% owner, officer and director.

27. In the 2-1/2 years that Bortner has run the company her way and to my exclusion, 3FX has seen no significant increase in revenues. However, there have been substantial increases in unwarranted overhead expenses.

28. It is my contention that the company is no longer being run efficiently or cost effectively. Revenues are up slightly, but profitability is down.

29. The fair market value of 3FX as of the date I was frozen out of the corporation was in excess of \$2,000,000. But as a result of Bortner's unilateral and poor decisions, self-dealing and mismanagement, the current value of the corporation has likely dropped substantially.

30. The following is a list of items that were either done without my knowledge and/or against my stated wishes and concerns.

- a. Bortner has increased her annual salary from \$100,000 to \$150,000.
- b. In 2013, Bortner provided three (3) top employees 40% increases in salary.
- c. I landed Hoffmann La-Roche as a key client in 2012. Bortner scheduled a meeting with the client in Basil, Switzerland to introduce Mr. Gottlieb as the client's new 3FX contact. Bortner brought her husband and young daughter with her on that trip. All four of them flew first class and stayed at an expensive hotel on funds advanced by 3FX. When I learned of this, I complained to Bortner. She told me that these expenses would be reimbursed to 3FX by

the client. However, and quite predictably, when the expense report was submitted to the client, it refused reimbursement saying the costs were unwarranted and excessive.

d. Bortner has agreed to pay Mr. Gottlieb a 10% commission of Hoffmann-La Roche projects even though that account pre-dated his hiring.

e. In 2014, Bortner and Mr. Gottlieb hired Debbie Cauterucci as a Sales Representative at an annual salary of \$85,000. She lasted only 6 months, during which she obtained only a single, small value project.

f. Bortner engaged a personal friend, Dawn Sedgwick, as a freelance Project Manager and paid her approximately \$20,000 to perform services that could have been done in-house at a greatly reduced cost.

g. Bortner hired Vendere Partners as an outside sales company. This decision cost 3FX \$33,000, but resulted in no business, until Bortner terminated the relationship.

h. In 2015, 3FX needed to hire a replacement Project Manager. The replacement salary, as determined by Bortner, was \$70,000 – plus a \$5,000 increase in Jan. 2016.

i. Bortner has caused 3FX to spend approximately \$5,000 for ad space in the *Medical SourceBook Illustrators Guide* despite the fact that 3FX's prior participation in this publication has resulted in no project inquiries.

j. In 2013, Bortner decided that purchasing a booth-space at the 3-day Digital Pharma East trade show would yield additional clients and revenue. 3FX also attended in 2014 and 2015, at a cost of approximately \$20,000 each time. In 2015, 3FX is listed as a Sponsor, costing an additional unknown amount. To date, I am unaware of a single project being awarded from any of the 3-years of attending that trade show.

k. Bortner used 3FX funds, to pay invoices from her attorney who had

attempted to negotiate a buyout of my shares.

l. Bortner has used the company Citibank card to buy family groceries, lunches, technology devices, and educational purchases for her daughter. When questioned about the charges, she called it a mistake, as her personal and company cards "are the same color."

m. In 2015, Bortner had the corporate checking account changed to require her signature only. I do not know if I remain a signatory, although it would not matter because I do not have access to any checks.

n. The use of freelancers to assist in projects has increased in 2015, even though our billings are reduced. My opinion is that our in-house staff is fully capable of producing our work without outside assistance.

o. 3FX's travel expenses have increased dramatically beginning in 2014 and much of the travel is unnecessary.

p. I had always been provided financial reports on a bi-weekly basis when our bookkeeper was in the office. Following the cancellation of the buyout negotiations, these reports have been stopped by Bortner. I have continued to demand them, only to be ignored, or provided with minimal information. I have received no bi-weekly financial reports since October, 2015.

q. Historically, Bortner and I would agree upon the appropriate year-end distribution to shareholders by Dec. 31st. However, in 2015, I was provided with no financial information, and Bortner unilaterally determined that there would be no year-end distribution to the shareholders for the first time in 3FX's history. Effective January 1, 2016, however, Bortner gave herself a salary increase.

r. For 2016, Bortner has added \$152,000 in additional corporate salary

expense.

s. Bortner has prepared an operating budget for 2016 which estimates that there will be no profits available for distribution at year's end. Even more troubling, is that, based on the budgeted need to earn \$166,666 per month, 3FX is far behind its estimate revenue for 2016.

t. At our Q1 Board Meeting held on April 13, 2016, I found that both Bortner and our bookkeeper had referred to bound copies of our year-end 2015 Financial Statements. They were obviously delivered to the office by 3FX's accountant. However, I have not received copies of anything but 3FX's Federal tax return.

u. On the 2015 Federal tax return, Form 1125-E Compensation of Officers, my name was omitted and Bortner is listed as the only corporate officer.

v. On or around March 2015, I noticed that I could no longer remotely access any information within the company servers. Prior to this, all information to all workstations and storage devices was available to me. I would use this to access marketing materials and video clips that had been requested by potential clients.

Further affiant sayeth not.


CORY A. RESH

Sworn to and subscribed before
me this 16 day of May, 2016.


NOTARY PUBLIC

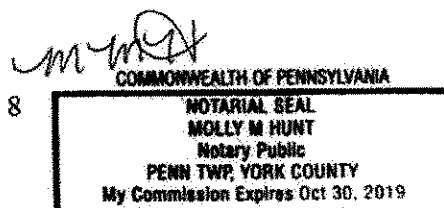
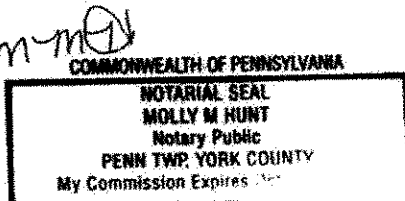


EXHIBIT B

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Cory A Resh

DEFENDANTS

Jody Bortner and 3FX, Inc.

(b) County of Residence of First Listed Plaintiff **Osceola, Co., Florida**
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant **Bucks**
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)

Stanley B. Cheiken

101 Greenwood Ave., Suite 400

Jenkintown, PA 19046, (215) 572-8600

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act (Excludes Veterans) <input type="checkbox"/> 152 Recovery of Defaulted Student Loans <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input checked="" type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. Section 1332

Brief description of cause:

Shareholder Freezeout/Breach of Fiduciary Duty

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
1,000,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE 5/12/16 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: 3206 Slate Road, St. Cloud, FL 34772

Address of Defendant: 4178 Milords Lane, Doylestown, PA 18902

Place of Accident, Incident or Transaction: Blue Bell, PA
(Use Reverse Side For Additional Space)

Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?
(Attach two copies of the Disclosure Statement Form in accordance with Fed.R.Civ.P. 7.1(a)) Yes ☐ No ☒

Does this case involve multidistrict litigation possibilities? Yes ☐ No ☒

RELATED CASE, IF ANY:

Case Number: Judge Date Terminated:

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes ☐ No ☒
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes ☐ No ☒
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes ☐ No ☒

CIVIL: (Place in ONE CATEGORY ONLY)

A. Federal Question Cases:

1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act-Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☐ All other Federal Question Cases
(Please specify)

B. Diversity Jurisdiction Cases:

1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability — Asbestos
9. ☒ All other Diversity Cases

ARBITRATION CERTIFICATION

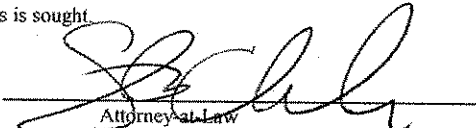
(Check appropriate Category)

I, Stanley B. Cheiken, Esquire, counsel of record do hereby certify:

☒ Pursuant to Local Civil Rule 53.2, Section 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs;

☒ Relief other than monetary damages is sought

DATE: 5/12/16


Attorney at Law

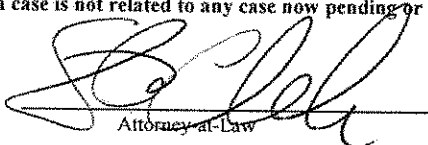
62106

Attorney I.D.#

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 5/12/16


Attorney at Law

62106

Attorney I.D.#

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CASE MANAGEMENT TRACK DESIGNATION FORM

CORY A. RESH

Plaintiff,

v.

JODY BORTNER; AND
3FX, INC.

Defendants.

CIVIL ACTION

No.

JURY TRIAL DEMANDED

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a case management track designation form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

- (a) Habeas Corpus – Cases brought under 28 U.S.C. §2241 through §2255. ()
- (b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits ()
- (c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ()
- (d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ()
- (e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ()
- (f) Standard Management – Cases that do not fall into any one of the other tracks. (x)

5/12/16

Date

(215) 572-8600

Telephone

Stanley B. Cheiken

Attorney-at-law

(215) 572-7838

Fax Number


Attorney for Plaintiff

sbc@cheikenlaw.com

Email Address

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CORY A. RESH,
3206 Slate Road
St. Cloud, Florida 34772,

Plaintiff,

v.

JODY BORTNER
4178 Milords Lane
Doylestown, Pennsylvania 18902,

-AND-

3FX, INC.
751 Arbor Way, Suite 110
Blue Bell, Pennsylvania 19422

Defendants.

CIVIL ACTION

No.

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Cory A. Resh, by and through undersigned counsel, hereby brings this action against defendants Jody Bortner and 3FX, Inc., and avers as follows:

PARTIES

1. Plaintiff Cory A. Resh ("Resh") is an adult individual and a citizen of the State of Florida residing at 3206 Slate Road, St. Cloud, Florida 34772.
2. Defendant Jody Bortner ("Bortner") is an adult individual and a citizen of the Commonwealth of Pennsylvania residing at 4178 Milords Lane, Doylestown, Pennsylvania 18902.

3. Defendant 3FX, Inc. ("3FX") is a corporation organized and existing pursuant to the laws of the Commonwealth of Pennsylvania with its principal place of business located at 751 Arbor Way, Suite 110, Blue Bell, PA 19422.

JURISDICTION AND VENUE

4. Jurisdiction exists in this matter pursuant to 28 U.S.C. §§ 1332 and 1367, there existing complete diversity of citizenship among the parties and the amount of controversy exceeding the sum of \$75,000 exclusive of interest and costs.

5. Venue lies within this Judicial District pursuant to 28 U.S.C. §1391(b)(2) because the events giving rise to this lawsuit occurred herein.

FACTUAL BACKGROUND

6. In 1995, Resh, Bortner and Greg O'Driscoll ("O'Driscoll") decided to go into a 3D animation business together as equal partners.

7. On September 29, 1995, they incorporated 3FX, with each of the three principals owning one-third of the shares of stock and constituting the officers and directors of the corporation.

8. When the business was started, Resh already had 14 years of experience as a 3D animation artist and had won an Emmy award. Bortner was a 2D artist without significant experience in 3D animation. O'Driscoll had experience in sales and marketing.

9. Approximately one year after the business commenced, Resh and Bortner purchased O'Driscoll's shares in the business, whereupon and continuing to this day, Resh and Bortner have been equal 50% shareholders of 3FX, as well as the only officers and directors of the corporation.

10. As equal owners of 3FX, until the events giving rise to this lawsuit, Resh and

Bortner have been required to work together and in consultation on all matters of importance to the corporation, and to reach a consensus about how to proceed in the best interests of the corporation.

11. After hiring and training production staff with 3D animation experience, in or about 2001, Resh's job duties were transitioned to Sales and Marketing. Bortner was a Project Manager and she took care of the day to day operations of the business.

12. The business of 3FX continued to grow, and in 2005, it hired the first of several Sales Representatives. At that point, Resh's role in the business was managing and working with the Sales Representatives to find new business and increase the revenue of 3FX. He was responsible for contacting and meeting with potential clients, presenting 3FX's capabilities, creating written project proposals, and furthering 3FX's offerings to clients through collaborations with outside vendors. Resh also produced print and electronic marketing materials, the company website, demo reels, etc.

13. Bortner's role continued to be as a Project Manager and to oversee daily operations of the company.

14. As equal owners of 3FX, Resh and Bortner received equal compensation from the corporation.

15. In the beginning of 2013, Bortner approached Resh and told him that, despite the fact that he had been in charge of all sales, marketing, and business development for the previous 12 years, she believed she could do a better job of increasing business revenue for 3FX.

16. After that conversation, Bortner began to do things "her way" and often without consulting Resh about important matters affecting the business of 3FX.

17. For example, in May 2013, Bortner hired Neil Gottlieb ("Gottlieb") as Vice

President of Sales, Marketing & Business Strategy. Bortner conducted the hiring process to the exclusion of Resh and never allowed him to meet or interview the candidates. Following her hiring decision, Bortner also determined, without Resh's input or approval, to pay Gottlieb \$135,000 per year, plus a 10% commission on all projects awarded to him. 3FX's previous sales representatives had been paid base salaries of \$50,000 per year. As a result of Bortner's unilateral decision, Gottlieb now earns more compensation from 3FX than even the owners.

18. Subsequent to her unilateral hiring of Gottlieb, Bortner started to work very closely with him, and together they made a concerted effort to ignore Resh and to exclude him from important business matters.

19. For example, Bortner and Gottlieb conducted meetings regarding the direction of the company's sales and marketing efforts. Resh was not invited to attend these meetings, nor was he made aware that they were occurring at the time. The existing strategies that had been implemented by Resh along with another Sales Representative were dismissed and ignored by Bortner.

20. Frustrated by the lack of respect shown to him by Bortner, in July 2013, the other Sales Representative abruptly resigned his position with 3FX, which resulted in a substantial loss of revenue for the business.

21. Resh spent the remainder of the 2013 insisting the Bortner include him in all discussions regarding sales and marketing. Bortner denied Resh at every turn. She was adamant that her decisions were the best for the company, and that Resh's decisions, thoughts and ideas were of no use. She began to run 3FX as if she were the majority controlling shareholder of the corporation and Resh were a minority owner whose vote was less valuable than hers.

22. While it was evident that it would be difficult, if not impossible, to repair their

working relationship as co-owners of 3FX, Bortner and Resh were able to reach a consensus that it would be best for her to purchase Resh's shares of the corporation. To this end, in 2013, they began to negotiate regarding the price and terms of a buyout of his interest in the corporation. However, although negotiations continued for an extended period, they were unable to reach an agreement.

23. In 2014, Bortner's conduct toward Resh became even more brazen, open and adversarial. She ignored his input as an owner, officer and director of the corporation for the entirety of 2014. At the employee Christmas party that year, Bortner made a speech to the employees which completely excluded Resh in all manner. This made it clear to the entire staff of 3FX that Bortner was acting as the controlling owner, and that she had no regard for Resh.

24. In January 2015, upon Resh's continued objection to her excluding him from the corporation's affairs and important business decisions, Bortner and Resh agreed to work toward finalizing a buy-out of his shares by the end of 2015.

25. In August 2015, Resh accepted Bortner's offer of \$1,000,000 for the purchase of his shares over a 4-year term. However, they were unable to finalize the terms of the buyout because, *inter alia*, Bortner was unwilling to guaranty the payments. She wanted to own 100% of the corporation's shares, but she was not willing to pay for them, except from the profits of the corporation, if profits were available. Thereafter, Bortner withdrew her offer to purchase Resh's shares entirely.

26. Nevertheless, and despite the fact the buyout negotiations were terminated by Bortner, she has continued to run the corporation as its controlling shareholder, excluding Resh from all decisions and ignoring his objections to her unilateral decisions.

27. In June 2015, Bortner unilaterally reduced Resh's annual salary from \$100,000 to

\$25,000.

28. Subsequently, Bortner has excluded Resh from all decisions regarding hiring, employee salaries, capital expenses, etc.

29. Moreover, Bortner has prevented Resh having access to the corporation's financial records. Despite his requests, he has not received financial reports since October 2015. He was not consulted with regard to the year-end bonus/distribution decisions that he and Bortner had typically made together at year's end since 1995. Bortner is simply determined to run the company her way, with absolutely no regard for Resh's rights as a 50% owner, officer and director.

30. In the 2-1/2 years that Bortner has run the company her way and to the exclusion of Resh, 3FX has seen no significant increase in revenues. However, there have been substantial increases in unwarranted overhead expenses.

31. 3FX is no longer being run efficiently or cost effectively.

32. Prior to Resh having been frozen out of the corporation by Bortner, the fair market value of 3FX was in excess of \$2,000,000.

33. As a result of Bortner's unilateral and poor decisions, self-dealing and mismanagement, the current value of 3FX has likely dropped substantially.

COUNT I BREACH OF FIDUCIARY DUTY

34. The averments contained in paragraphs 1 through 33 above are incorporated herein by reference as though set forth at length.

35. Defendant Bortner has maintained control of 3FX to the exclusion of Resh since 2013.

36. By virtue of her control of the corporation, Bortner owes a fiduciary duty to the other shareholder, Resh.

37. Bortner has breached her fiduciary duty to Resh by freezing him out of the corporation and oppressing his rights as a shareholder of 3FX.

38. The breaches of fiduciary duty by Bortner and freeze out of has included, *inter alia*, the following:

a. Bortner has increased her annual salary from \$100,000 to \$150,000 while decreasing Resh's salary from \$100,000 to \$25,000.

b. In 2013, Bortner unilaterally provided three (3) top employees 40% increases in salary.

c. Bortner scheduled a meeting with a client, Hoffmann La-Roche, in Basil, Switzerland to introduce Gottlieb as the client's new 3FX contact. Bortner brought her husband and young daughter with her on that trip. All four of them flew first class and stayed at an expensive hotel on funds advanced by 3FX. Bortner told Resh that these expenses would be reimbursed to 3FX by the client. However, when the expense report was submitted to the client, it refused reimbursement because the costs were unwarranted and excessive.

d. Bortner unilaterally agreed to pay Gottlieb a 10% commission of Hoffmann-La Roche projects even though that account pre-dated his hiring.

e. In 2014, Bortner and Gottlieb hired Debbie Cauterucci as a Sales Representative at an annual salary of \$85,000. She lasted only 6 months, during which she obtained only a single, small value project.

f. Bortner engaged a personal friend, Dawn Sedgwick, as a freelance Project Manager and paid her approximately \$20,000 to perform services that could have been done in-house at a greatly reduced cost.

g. Bortner hired Vendere Partners as an outside sales company. This decision cost 3FX \$33,000, but resulted in no business.

h. Bortner used 3FX funds, to pay invoices from her personal attorney who had attempted to negotiate Bortner's buyout of Resh's shares.

i. Bortner has used the company Citibank card to buy family groceries, lunches, technology devices, and educational purchases for her daughter.

j. In 2015, Bortner had the corporate checking account changed to require her signature only. Resh no longer has access to the corporation's checking account.

k. The use of freelancers to assist in projects has increased in 2015, even though 3FX's billings are reduced and the in-house staff is capable of producing the work without outside assistance.

l. 3FX's travel expenses have increased dramatically beginning in 2014 and much of the travel is unnecessary.

m. Resh had always been provided financial reports on a bi-weekly basis when 3FX's bookkeeper was in the office. Following the cancellation of the buyout negotiations by Bortner, she directed that Resh stop being provided those reports. Despite demand, he has not received bi-weekly financial reports since October, 2015.

n. Historically, Bortner and Resh would agree upon the appropriate year-end distribution to shareholders by Dec. 31st. However, in 2015 Bortner unilaterally determined that

there would be no year-end distribution to the shareholders for the first time in 3FX's history.

Effective as of January 1, 2016, she gave herself a substantial pay raise.

o. For 2016, Bortner has added \$152,000 in additional corporate salary expense.

p. Bortner has prepared an operating budget for 2016 which estimates that there will be no profits available for distribution at year's end. To date, 3FX is far behind its budgeted revenue estimates for 2016.

q. Resh has not been provided with 3FX's year-end 2015 Financial Statements.

r. On the 2015 Federal tax return, Form 1125-E Compensation of Officers, Resh's name was omitted and Bortner is listed as the only corporate officer.

s. On or around March 2015, Resh's remote access the company servers was removed.

39. As a result of said conduct, Resh has suffered and will continue to suffer damages.

40. As a frozen-out shareholder, Resh is entitled to an award of damages in the amount of the value of his 50% share in 3FX as of the date he was frozen out of the corporation – an amount which exceeds \$1 million.

41. The conduct of Bortner is extreme and outrageous, evidencing a wholesale disregard for Resh's rights, and thereby justifying the imposition of punitive damages.

42. Pursuant to 15 Pa.C.S. §1981(a)(1) and (2), it being in the best interests of the shareholders of 3FX, the Court should order an involuntary winding up and dissolution of 3FX, Inc. because:

a. The conduct of Bortner was oppressive; and

b. 3FX's assets are being misapplied and/or wasted.

43. Pursuant to 15 Pa.C.S. §1985, the Court should appoint a liquidating receiver to receive and disburse 3FX's assets in accordance with an orderly plan of involuntary dissolution.

WHEREFORE, Plaintiff Cory A. Resh demands judgment in his favor and against Defendant Jody Bortner in an amount in excess of \$75,000, together with punitive damages, interest and costs of suit and respectfully requests this Honorable Court to enter an Order of involuntary dissolution and appointing a liquidating receiver for 3FX, Inc.

Date: May 16, 2016


STANLEY B. CHEIKEN, ESQUIRE

Jenkintown Plaza – Suite 400
101 Greenwood Avenue
Jenkintown, PA 19046
(215) 572-8600

Attorney for Plaintiff Cory A. Resh

II. ARGUMENT

A. THE LEGAL STANDARD

The decision whether to appoint a receiver is within the discretion of the Court. *Simms v. Exeter Architectural Products*, 868 F.Supp. 668, 672 (M.D. Pa. 1994); *Stainton v. Tarantino*, 637 F.Supp. 1051, 1072 (E.D.Pa.1986) (quoting *Northampton National Bank of Easton v. Piscanio*, 475 Pa. 57, 63, 379 A.2d 870 (1977)). The appointment of a receiver is a drastic remedy to be exercised by the court with caution “under such circumstances as demand or require summary relief.” *Simms*, 868 F.Supp. at 672, *Stainton*, 637 F.Supp. at 1072 (quoting *Hankin v. Hankin*, 507 Pa. 603, 608, 493 A.2d 675 (1985)).

B. RESH IS ENTITLED TO THE APPOINTMENT OF A RECEIVER *PENDENTE LITE*

Resh seeks the appointment of a receiver to safeguard the financial condition of 3FX, Inc. until such time as the case can be decided on its merits. This request is specifically authorized under the statutory framework applicable to Pennsylvania corporations, especially in the circumstances presented in this case where one shareholder has been frozen out of the corporation by the other shareholder.

Majority shareholders owe to minority shareholders a fiduciary obligation of the “utmost good faith and loyalty.” *Orchard v. Covelli*, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984), *aff’d*, 802 F.2d 448 (3d Cir. 1986); see also *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 100-101 (3d Cir. 2001) (A majority shareholder “is under close scrutiny, and is expected to conform to the highest standards of conduct”); *Ferber v. Am. Lamp Corp.*, 503 Pa. 489, 469 A.2d 1046, 1050 (Pa. 1983) (“It has long been recognized that majority shareholders have a duty to protect the interests of the minority”); *Grill v. Aversa*, 908 F. Supp. 2d 573, 591-93 (M.D.Pa.

2012). Therefore, a “policy of corporate governance which has as its objective the denial of benefits to the minority interest runs afoul of this fairness standard and calls to question the majority’s fulfillment of its fiduciary duty to the other shareholders.” *Orchard*, 590 F. Supp. at 1556; see *Ski Roundtop, Inc. v. Hall*, 265 Pa. Super. 266, 401 A.2d 1203, 1209 (Pa.Super. 1979).

This is especially true in a closely-held corporation where shares are not publicly traded and a fair market is rarely available. *Orchard*, at 1557. Accordingly, Pennsylvania courts have held that majority shareholders’ duty to the minority “prevents them from using their power in such a way as to exclude the minority from their proper share of the benefits accruing from the enterprise.” *Ferber*, 469 A.2d at 1050 (Pa. 1983) (quoting *Hornsby v. Lohmeyer*, 364 Pa. 271, 72 A.2d 294, 298 (Pa. 1950)); See also *In re Jones & Laughlin Steel Corp.*, 488 Pa. 524, 412 A.2d 1099, 1103 (1980). Thus, actions taken by a majority shareholder that benefit her own interests must also be in the best interest of all shareholders and the corporation. *Id.* (citing *Weisbecker v. Hosier Wide Patents, Inc.*, 356 Pa. 244, 51 A.2d 811, 814, 817 (Pa. 1947)). “Pennsylvania law shifts the burden onto the fiduciary to prove that a transaction is fair and not fraudulent when the fiduciary acts to benefit himself while in the fiduciary role.” *Bohler-Uddeholm*, 247 F.3d at 100-101; *Grill*, 908 F. Supp. 2d at 591-93.

A majority shareholder may not use the corporate process to deny a minority shareholder the right to participate in the corporation or to “exclude minority shareholders from their proper share of benefits accruing from the enterprise.” *Viener v. Jacobs*, 834 A.2d 546, 556 (Pa.Super. 2003); see *Orchard*, 590 F. Supp. at 1556; *Hill v. Ofalt*, 85 A.3d 540, 550 (Pa.Super. 2014).

A “freeze-out” occurs in a closely-held corporation when a minority shareholder is removed from office or his power or compensation is substantially diminished, in an attempt to

exclude the shareholder from any meaningful role in the corporation or deny him benefits from the corporation. *Viener*, 834 A.2d at 556 (citing *15 Pa. Cons. Stat. § 1767*). Such an attempt by a majority shareholder to “freeze-out” or “squeeze-out” a minority shareholder constitutes a breach of this fiduciary duty. Tactics employed against a minority shareholder to effect such a “freeze-out” include, but are not limited to: ‘generally oppressive conduct, the withholding of dividends, restricting or precluding employment in the corporation, paying excessive salaries to majority stockholders, withholding information relating to the operation of the corporation, appropriation of corporate assets, denying dissenting shareholders appraisal rights, failure to hold meetings and excluding the minority from a meaningful role in the corporate decision-making.’ *Orchard*, at 1557.

Here, Bortner may be anticipated to contend that, because she owns only 50% of the shares of 3FX, Inc., she cannot be deemed a majority shareholder and does not owe a fiduciary obligation to Resh. Under this theory, Bortner’s own lawlessness, in commandeering the corporation and ignoring the rights of her 50% co-owner, would be rewarded with impunity from the harm caused by her misconduct. Under the circumstances here presented, where Bortner freely exercises the rights of a majority shareholder, she must be deemed to owe the same fiduciary duty Resh as would a 51% shareholder.

The courts that have considered these circumstances have consistently applied a framework which imposes a fiduciary duty upon non-majority shareholders who use control of the corporation to freeze out another shareholder. For example, in *Liss v. Liss*, 2002 WL 576510 *6 (C.P.Phila. March 22, 2002), the trial court permitted a claim for breach of fiduciary brought by one 50% shareholder against another 50% shareholder to go forward under a majority freeze

out theory. The *Liss* court reasoned that such a claim was cognizable where, just as in this case, a 50% shareholder “allegedly used his control of [the corporation] to ‘oppress’ [the other 50% shareholder] and exclude him from [corporate] operations.” *Liss*, at *6. (citing *Baron v. Pritzker*, 52 Pa. D. & C.4th 14 *3 (C.P.Phila. Mar. 6, 2001); *Delaney v. Georgia-Pacific Corp.*, 564 P.2d 277, 281 (Or.1977); *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del.Ch.1984); and *ALI Principles* § 1.10(a)(2) and (b) (definition of controlling shareholder)).

Where a shareholder has been frozen out of a closely held corporation, a proper measure of damages for breach of fiduciary duty is to place a fair value on the minority shareholder’s ownership interest in the closely held corporation before the freeze out. See *Viener*, 834 A.2d at 556-58; *Orchard*, 590 F. Supp. at 1560. Damages are assessed in this amount against the majority shareholder who is determined to have breached his fiduciary duty to the minority by squeezing him out of the closely-held corporation. *Id.*

Here, Resh has asserted a claim for breach of fiduciary duty under the squeeze out approach outlined in *Viener* and *Orchard*. In the trial of his claim on the merits, Resh will seek damages based upon the fair market value of his shares at the time of the freeze out. Nevertheless, Resh is in immediate need of preliminary injunctive relief in order to preserve the financial condition of 3FX, Inc. pending the outcome of the dispute on the merits. As an oppressed shareholder, the law establishes a framework to provide the relief Resh now seeks.

Pursuant to 15 Pa.C.S. § 1767, a court may appoint a custodian for a corporation upon application of a shareholder when:

In the case of a closely held corporation, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5 percent or

more of the outstanding shares of any class of the corporation in their capacities as shareholders, directors, officers or employees.

15 Pa.C.S. § 1767(a)(2). A closely-held corporation is defined as a corporation with 30 or fewer shareholders. 15 Pa.C.S. § 1103. 3FX, Inc. is a closely-held corporation because it has only two shareholders, Resh and Bortner. Resh owns 50% of the outstanding shares of 3FX, Inc., and he is a director of the corporation. Thus, under 15 Pa.C.S. §1767, he has standing to request this Court to appoint of a custodian to protect his rights from the oppressive conduct of Bortner, who has taken control of the corporation to Resh's exclusion.

Moreover, preliminary relief is entirely appropriate in the context of corporate disputes such as the instant case. The Business Corporation Law specifically empowers this Court to issue a preliminary injunction to preserve the status quo and to prevent unlawful and oppressive conduct by corporate fiduciaries. 15 Pa.C.S. §1984 provides that:

Upon the filing of an application under this subchapter, the court may issue injunctions, appoint a receiver *pendente lite* with such powers and duties as the court from time to time may direct and proceed as may be requisite to preserve the corporate assets wherever situated and to carry on the business of the corporation until a full hearing can be had.

15 Pa.C.S. § 1984. Thus, the showing of oppression by Bortner is a sufficient basis for the Court to appoint a receiver *pendente lite* to safeguard the corporation until the parties' dispute can be determined on its merits.

Even if the foregoing statutory remedy did not exist, this Court would still have the power, in equity, to enjoin the shareholder oppression being perpetrated by Bortner. When the gravamen of a claim focuses upon oppression by a controlling shareholder of a closely held corporation, equitable relief is traditionally available. *Baron v. Pritzker*, 2001 Pa. Dist. & Cnty.

Dec. LEXIS 447 *6; 52 Pa. D. & C.4th 14 (March 6, 2001) See *e.g.*, *Orchard v. Covelli*, 590 F. Supp. 1548, 1560 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986).

The facts set forth in the instant Petition and Affidavit of Cory A. Resh easily establish oppressive conduct on the part of Bortner. Oppressive conduct may take the form of “freezing out” a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation. See, *15 Pa.C.S. § 1767*, amended comment. Just a few examples of the oppressive conduct by Bortner are:

- Excluding Resh from important corporate decisions, such as the hiring and compensation of key personnel, and strategic marketing approaches to business development.
- Removing Resh’s regular access to the financial books and records of the corporation.
- Increasing Bortner’s salary without the approval of Resh.
- Unilaterally decreasing Resh’s salary.
- Failing to make a year-end profit distribution when profits should have been available for distribution to shareholders.
- Using corporate funds for personal expenses and travel.
- Omitting Resh from the listed corporate officers on 3FX’s 2015 tax return.

Resh’s complaints and admonitions to Bortner have fallen on deaf ears. Regrettably, Bortner has simply chosen to ignore Resh and to operate 3FX, Inc. as if she were the sole shareholder. Resh’s 50% ownership has been compromised by virtue of Bortner’s steadfast and stubborn refusal to acknowledge his rights as an owner, officer and director of the corporation.

III. CONCLUSION

For the foregoing reasons, Cory A. Resh is entitled to have a receiver pendent lite appointed to take over the control of 3FX, Inc. pending the outcome of the parties' dispute on the merits.

Respectfully submitted,

Date: May 19, 2016

STANLEY B. CHEIKEN, ESQUIRE

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served a true and correct copy of the foregoing Petition for Appointment of a Receiver *Pendente Lite* upon the following persons by first-class mail, postage prepaid:

JODY BORTNER
4178 Milords Lane
Doylestown, PA 18902

3FX, INC.
751 Arbor Way, Suite 110
Blue Bell, PA 19422

Date: May 19, 2016

/s/ Stanley B. Cheiken, Esquire (SC1060)
STANLEY B. CHEIKEN, ESQUIRE

Attorney for Plaintiff Cory A. Resh